

Washington State Attorney General Opinion Addresses Confidentiality of Executive Sessions of Open Public Meetings

Legal Alert
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[Attorney General Opinion \(AGO\) 2017 No. 5](#) offers guidance on the confidentiality of information shared in an executive session of a public meeting under the Washington Open Public Meetings Act (OPMA), ch. 42.30 RCW.

The AGO first concludes that participants may not disclose information discussed in a properly-convened executive session under the OPMA. While the OPMA does not expressly state so, the “duty on the part of participants in an executive session not to disclose the information discussed there is part and parcel of the concept of an executive session.” The AGO relied on out of state authority, treatises, and legislative history to support its conclusion that maintaining confidentiality “is a legal obligation, and not solely a moral one.” This duty only extends to information relating to the statutorily authorized purpose for convening the executive session and not already publicly disclosed.

The AGO also concludes that any officer covered by the Code of Ethics of Municipal Officers, RCW 42.23 RCW, violates that statute by disclosing information made confidential by the OPMA. The Code of Ethics prohibits disclosing “confidential information gained by reason of the officer’s position” and applies to “all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.” RCW 42.23.070(4), RCW 42.23.020(2).

According to the AGO, disclosing information from executive sessions could also constitute a misdemeanor under RCW 42.20.100 or official misconduct under RCW 9A.80.010. RCW

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42.20.100 provides, “Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their willful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor.” RCW 9A.80.010 provides that a public servant is guilty of official misconduct, a gross misdemeanor, if “with intent to obtain a benefit or to deprive another person of a lawful right or privilege” he “intentionally commits an unauthorized act under color of law.” The AGO notes that this remedy may not be pursued often due to prosecutorial discretion, the heightened standard of proof in criminal proceedings, and difficulty in proving the required mental state.

A governing body could enforce the confidentiality of executive sessions by obtaining a court order under RCW 42.30.130. That statute provides an action for mandamus or injunction to stop OPMA violations. The AGO cautions that without a court order, any effort to exclude a member of a governing body of a public agency from executive session based on concerns about confidentiality would be “legally risky.” The AGO notes that “sufficiently extreme facts might arise that would make exclusion appropriate even without a court order.” For example, where a board member is suing the board, courts have upheld the board’s ability to exclude the member from executive sessions discussing the litigation.

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